

**U.S. Environmental Protection Agency
Office of General Counsel**

Procedures for Responding to Freedom of Information Act Requests

March 31, 2015

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A. PURPOSE

These procedures provide basic instructions for responding to Freedom of Information Act (FOIA) requests submitted to the U.S. Environmental Protection Agency (EPA or Agency) and assigned to the Office of General Counsel (OGC). They address the statutory, policy, procedural and processing requirements OGC personnel must follow when responding to FOIA requests.

B. SCOPE AND APPLICABILITY

These procedures apply to OGC employees, grantees, contractors (as appropriate), interns, and others who support the OGC FOIA administration activities.

C. AUTHORITY

Freedom of Information Act, 5 U.S.C. § 552
EPA's FOIA Regulations, Title 40, Code of Federal Regulations, Part 2, Subpart A
CIO Policy 2157.1, Freedom of Information Act Policy (2014)
CIO Procedure 2157-P-01.1, Procedures for Responding to Freedom of Information Act Requests (2014)

D. PROCEDURES

INITIATING THE FOIA PROCESS

The Agency FOIA Office (National FOIA Office or a Regional FOIA Office) is responsible for initiating the FOIA process.¹ The FOIA process officially begins when a request is received by the Agency FOIA Office. The Agency FOIA Office verifies that the request: (1) is in writing; (2) provides a mailing address; (3) asks for Agency records; and (4) reasonably describes the records sought.

All FOIA requests will be processed on FOIAonline, the Agency's FOIA website, available at: <https://foiaonline.regulations.gov>. All Associate General Counsels, Directors, and Assistant General Counsels in OGC are expected to have a FOIAonline account.

There are two ways in which OGC is involved in FOIA requests. First, if the Agency FOIA Office (National FOIA Office or a Regional FOIA Office) determines that OGC is the office where responsive documents are most likely located in the Agency, the Agency FOIA Office will assign the FOIA to OGC. OGC's General Law Office is then responsible for assigning the FOIA to the individual law office(s) in OGC where responsive documents are most likely located. The assigned law office(s) is called the "Action Office" or lead office for the FOIA. Second, if the Agency FOIA Office assigns the FOIA to another office in the Agency, such as a

¹ If an Office of General Counsel (OGC) law office receives a FOIA request directly from the public, it should immediately forward that request to the National FOIA Office so that the requester does not incur undue processing delays. See 40 C.F.R. § 2.102(a). Such requests should be forwarded to Larry Gottesman, the Agency FOIA Officer.

program office, that office may then assign a task to OGC via FOIAonline, asking that OGC search and provide responsive records to the FOIA request at issue. In this situation, OGC does not have the lead on the FOIA request, but instead is responsible for providing responsive records to the Action Office. The General Law Office reviews all incoming tasks on FOIAonline and then assigns those tasks to the relevant law office(s). In this situation, the individual law office is called a “Contributing Office.” Contributing Offices must coordinate the Agency’s response with the Action Office, including uploading responsive records into the FOIAonline system.

As further background, prior to assigning a FOIA request to OGC or any office, the Agency FOIA Office determines how requesters will be charged processing fees based on their fee category. The four types of requesters under the FOIA are: (1) Commercial Use, (2) Educational Institution or Non-Commercial Scientific Institution, (3) Representative of the News Media, and (4) Other. *See also*, 40 C.F.R. § 2.107. Any questions regarding an assigned fee category should be directed to the National FOIA Office.

All requests for fee waivers and expedited processing must be submitted with the initial FOIA request. *See* 40 C.F.R. § 2.107(l)(5). Decisions on fee waiver and expedited processing requests will be made by the Agency FOIA Officer based on the factors outlined in 40 C.F.R. §§ 2.107(I) and 2.104(e), respectively. The Agency FOIA Officer will make the initial decision whether to grant or deny a fee waiver or expedited processing request. At times, the Agency FOIA Officer may contact affected offices, requesting information that may assist the Agency FOIA Officer in making a decision on a fee waiver or expedited processing request.

PROCESSING THE REQUEST IN ACTION OFFICES²

Step 1 – Assign the Request to the Action Office.

If the Agency FOIA Office assigns OGC as the lead office for a FOIA request, the General Law Office will review the request and assign that request to the relevant individual law office(s) for processing. The individual law office(s) is the Action Office for the assigned FOIA request. If two or more law offices are assigned to a FOIA request (a co-lead situation), those offices must coordinate in terms of contacting the requester to either narrow the request and/or seek an extension of time. In this situation, the General Law Office will designate one individual law office as the “Action Office” or lead office for the request. The Action Office will then be responsible for closing the request in FOIAonline, when the FOIA is completed.³

² This section sets forth step-by-step instructions for responding to FOIA requests. OGC’s General Law Office will update and amend these procedures, as necessary.

³ If a FOIA appears to be one that, because of the complexity or volume of information requested, would benefit from the assistance of the FOIA Expert Assistance Team (FEAT), the Associate General Counsel or Director should consult with the FEAT Director.

Step 2 – Determine the Scope of the FOIA Request.

The FOIA request should identify the date range for the requested material. In some instances, however, the FOIA request seeks information from some prior date to the present and does not specify a particular end date (or cut-off date). In such instances, the Action Office should treat the cut-off date as the date the FOIA request was received by the Agency FOIA Office pursuant to 40 C.F.R. § 2.103(a). Alternatively, the Action Office can negotiate a different, earlier cut-off date with the requester.

A FOIA request cannot seek future records.

The Action Office should review the FOIA request to determine the subject matter of the records sought in the request. A description is sufficient if it enables an Agency employee familiar with the subject area to locate the record with a reasonable amount of effort. *See also*, 40 C.F.R. § 2.102(c).

□ Improper FOIA requests include:

- *Requests that do not reasonably describe the records sought. For example, a FOIA request seeking all records related to “climate change” is an improper request.*
- *Requests that pose questions, rather than seek documents.*

□ FOIA does not require EPA to:

- *Create new records in response to a request;*
- *Re-create records which were properly disposed of;*
- *Produce records the Agency retains no control over;*
- *Provide records that EPA already makes available to the public (i.e. public dockets on regulations.gov.); or*
- *Produce purely personal records.*

If the Action Office determines the FOIA request constitutes an improper request, it must contact the FOIA requester and ask the requester to clarify or modify the request. *See Attachment A*, Template for responding to an improper FOIA request. *See also Step 5* (addressing situations where there is a proper FOIA request, but the Action Office seeks to narrow or clarify the request).

Step 3 – Determine if Responsive Records are in Other OGC Law Offices, Other Regions or Other Agency Organizations.

If the Action Office determines that additional responsive records are located in other EPA organizations or other regions, it should task those other relevant offices through FOIAonline, and request that they search for documents responsive to the request. In this situation, the offices tasked to seek records are called “Contributing Offices.”

Step 4 – Estimate Processing Fee.

The Action Office will complete the Administrative Cost section in FOIAonline to document billable and unbillable costs. FOIA requesters will be charged fees for processing the request based on their fee category.

Four Types of Requesters	Three Fee Categories		
	Search*	Review	Duplication
Commercial	Yes **	Yes	Yes
Educational or Noncommercial	No	No	Yes (100 pages free)*
News Media	No	No	Yes (100 pages free)*
All Others	Yes (First 2 hours free)*	No	Yes (100 pages free)

*Search fees may apply even when there are no responsive records or no responsive records are released.

**Fees shaded in grey above cannot be charged if the Agency fails to comply with time limits for a response and does not seek a timely extension.

Pursuant to 40 C.F.R. § 2.107(e), EPA provides a fee estimate to the requester and requires written assurance of payment before further processing the FOIA request when the estimated fees exceed \$25.00, unless the Agency FOIA Officer has granted a fee waiver. To estimate the processing fee, the Action Office must approximate the time needed for each staff person with responsive records to search for, review, and duplicate those records, and then determine which fees are appropriately charged to the specific requester. Absent a granted fee waiver, fees are charged as specified in 40 C.F.R. § 2.107. The chart above is a summary of the fee charges in 40 C.F.R. § 2.107.

If EPA begins processing a request and the Action Office determines the fees are likely to exceed the first fee estimate (\$25 or the amount agreed to by the requester), EPA must notify the requester of the revised estimated processing fee and the Action Office should put the request on hold and do no further work on the request until the requester agrees to pay the revised fee. The Action Office must memorialize fee commitments in writing. *See Attachment B*, Template to request a written assurance of payment.

If EPA does not (1) respond to a FOIA request in a timely manner, or (2) inform the requester that the request presents “unusual circumstances” that require additional time and provide the requester with the opportunity to narrow the request by the due date, then EPA cannot charge: (1) search time for commercial use requesters and all other requesters, and (2) duplication fees for requesters in educational, non-commercial scientific, and news media categories.

Step 5 – Determine Response Time.

Under the FOIA, the 20 working day statutory time limit begins when the FOIA request is received by the National FOIA Office. FOIAonline will specify the due date for completion of the FOIA request. Extensions of time or tolling of the FOIA request may occur in the following instances.

- **Extension of Time to Clarify a Request.** EPA can toll or “stop the clock” once to seek information or clarification from the requester. Although EPA can contact the requester as many times as is needed to clarify the scope of the request, *the clock may be stopped only once*. The clock restarts when the requester provides the information or clarification. The Action Office can revise the due date and restart the clock. If the Action Office determines that it cannot respond to a request because the requester failed to clarify the request, it should consult with an attorney in the General Law Office Information Law Practice Group. *See Attachment C*, template to clarify the scope of a FOIA request.
- **Extension of Time to Obtain a Fee Commitment.** The Action Office can exclude from the response time the time spent to obtain a fee commitment from the requester. The clock may be stopped as many times as necessary to obtain a fee commitment. The Action Office must document changes to the due date in FOIAonline. *See Attachment B*, Template to request a written assurance of payment.
- **Extension of Time for “Unusual Circumstances.”** EPA is entitled to a 10 working day extension of time, and may negotiate a longer extension of time, if there are “unusual circumstances.” The FOIA defines “unusual circumstances” to include:
 - Search for and collect responsive records from multiple offices;
 - Search for, collect and review a voluminous amount of records; or
 - Consult with another agency or two or more EPA offices.
- If any of these unusual circumstances exist and EPA **can respond within 10 additional working days or less**, the Action Office **must**, *within the original 20 working day time limit*, notify the requester in writing that unusual circumstances exist and provide the new due date. *See Attachment D*, Template to request an extension (10 days or less) based on “unusual circumstances.”
- If unusual circumstances exist and EPA **needs to extend the due date for more than 10 working days**, the Action Office should contact the requester *within the original 20-working day response time* and inform the requester that unusual circumstances exist and provide the new due date. *See Attachment E*, Template to request an extension (greater than 10 days) based on “unusual circumstances.” The Action Office should also give the requester an opportunity to:
 - Modify the scope of the request so that the response can be completed within the 10-day statutory extension period;
 - Modify the scope of the request and agree to a new deadline; or
 - If the requester is unwilling to modify the request or agree to a new deadline, the request will be placed on a complex track and the Action Office will determine a reasonable deadline and communicate the deadline to the requester. The requester may file an administrative appeal.

- For each request for an extension, the Action Office is required to provide the requester, in writing, (1) an estimated response date for the FOIA; and (2) the contact information for EPA's FOIA Public Liaison. The phone number for EPA's FOIA Public Liaison is 202-566-1659.
- If the FOIA response time has been extended, please update the FOIA request's deadline in FOIA online and upload all communications with the FOIA requester documenting the new response deadline.

Practice Tip: The Importance of requesting an extension of time.

- EPA may no longer charge search and duplication fees to certain requesters if EPA fails to comply with the statutory time limit or agreed-upon extension of time.
- A late response may be considered a constructive denial of the FOIA request, and the requester does not have to file an administrative appeal before filing a lawsuit. If sued, EPA may be liable for the requester's attorneys' fees. Attorneys' fees and costs are paid directly from the Action Office's budget and not the U.S. Treasury's Judgment Fund.

Step 6 – Collect and Review and Prepare the Records for Release.

The Action Office is responsible for identifying, collecting and reviewing records within the scope of the request as discussed in **Step 2**. The Action Office is also responsible for consultation and referral with other federal agencies, if relevant.

To the extent an individual OGC law office is tasked by an Action Office to be a Contributing Office, the OGC Contributing Office is responsible for coordinating responsive activities with that Action Office, which includes searching for responsive records and uploading the records onto FOIA online. The Action Office (and each Contributing Office) should assure that information subject to an applicable exemption under the FOIA has been redacted from records before they are released. All released records must be approved by an authorized official (*see Step 10*).

Collection of Records

EPA is responsible for searching for records in all locations where responsive records are reasonably likely to exist. For example, collection of records responsive to a FOIA request may require searching a custodian's Microsoft Outlook email and calendar; Lotus Notes email and calendar; electronic file folders in his/her C: drive; network drives (F:, G:, etc.); thumb drives or CDs; enterprise content management system, the correspondence management system, and other Agency databases; paper files in his/her office and file cabinets; and the Federal Records Center.

If a significant number of electronic records are responsive to a request, either a Lotus Notes collection database or a Relativity Workspace may be warranted. If either a Lotus Notes collection database or a Relativity Workspace are desired, contact Mike Murphy in OGC's Resource Management Office to submit the request. You may also contact the E-Discovery

Helpdesk (1-855-372-3472 or <http://intranet.epa.gov/ediscovery/helpdesk/index.html>) to place a request for a Relativity Workspace.

Review of Responsive Records

- **Identify Exemptions.** All Action and Contributing Offices are responsible for identifying records or portions of records that are exempt from disclosure under FOIA. There are nine FOIA exemptions. Use the OGC FOIA Exemption Tip Sheet when reviewing responsive documents to identify records or portions of records that are exempt from disclosure. *See Attachment F, FOIA Exemption Tip Sheet.*
- **Redact.** The Action Office must:
 - ensure that redacted information cannot be read on photocopiers; and
 - identify the applicable FOIA exemption(s) at the point of each redaction. Specific guidance on segregation of non-exempt information is provided by the Department of Justice at: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-segregating-and-marking-documents-release-accordance-open>.
- **Upload Responsive Records into FOIAonline.** All records that are being released in full or released with redactions by EPA in response to a FOIA request must be entered into FOIAonline unless the records are subject to special handling requirements or policies (e.g., contain sensitive personally identifiable information) or the volume of paper records is very large and conversion to e-format is not practical. If you have such a case, send a request for an exception to Larry Gottesman, the Agency FOIA Officer, who reviews these exceptions on a case-by-case basis. All records being *withheld in full* in response to a FOIA request also must be uploaded in FOIAonline, but such documents are to be designated “Unreleasable” (or “UR”).

Consultation and Referrals to Other Federal Agencies

In the course of processing records responsive to a FOIA request, the Action Office may locate records that originated with another federal agency. In accordance with 40 C.F.R. § 2.103(d), the Action Office receiving the request shall either: (1) direct the National FOIA Office to refer the request to the originating federal agency for it to process the records, or (2) consult with the federal agency where the record or portion of the record originated.

The Department of Justice provides procedures for referrals and consultations with other federal agencies at: <http://www.justice.gov/oip/foiapost/2011foiapost42.html>. Please be sure to account for the additional time required to complete the referral or consultation. Also, consulting with another agency is deemed to be an “unusual circumstance,” which allows EPA to request more time to respond to a FOIA request (*see Step 5*).

Step 7 – Determine Appropriate Response.

After the Action Office has properly reviewed and redacted (if necessary) responsive records, the Action Office prepares one of the following final determinations after appropriate approvals have been obtained (*see* **Step 10**):

- Full Release. All responsive records are released in full.
- Partial Denial. Responsive records or portions of the records are exempt from disclosure under the FOIA and are withheld, while other responsive records or portions of the records are not exempt and are released to the requester.
- Full Denial. All responsive records, in their entirety, are exempt from disclosure and withheld from the requester.
- No Records. If, after conducting a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, inform the requester in writing of this result. The requester can appeal a “no record” response. If an Action Office does not uncover responsive documents in response to a FOIA request, it should document the offices (or custodians) who conducted the search and the results of its search in the “Task Comments” section in FOIAonline.
- Confidential Business Information (CBI). For records or parts of records that have been claimed as CBI, follow the procedures set out at 40 C.F.R. Part 2, Subpart B.
- Glomar Response. When confirming or denying the existence of responsive records would, in and of itself, reveal exempt information, EPA may expressly refuse to confirm or deny the existence of records responsive to a FOIA request; this is called a “Glomar” response. The response letter informs the requester that the request is denied because “either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of FOIA.” Action Offices *must* contact the General Law Office Information Law Practice Group for concurrence prior to issuing a “Glomar” response.

Step 8 – Prepare Response Letter.

The Action Office must prepare the final response letter and obtain necessary concurrences. (*See* **Step 10** regarding necessary concurrences.) All final response letters, including full releases, must provide the FOIA tracking number and required appeal language. *See* **Attachment G**, Templates of final response letters.

For denials (partial or full), final responses should include copies of the documents withheld in part with annotated deletions on the documents. In addition, final responses with documents withheld in full should include a summary or basic list of the documents being withheld. All final responses that involve partial or full denial should include the following information:

- Identify the records being withheld (individual or, if a large number of similar records are being denied, by described category)
- Identify any FOIA exemption(s) applied; and
- Estimate the volume of records being withheld (in pages or other forms of estimation).

A full *Vaughn* index is not required for initial responses.

Step 9 – Finalize Processing Fees.

The Action Office must complete the Administrative Cost section in FOIAonline to document costs. EPA is required to document actual fees charged to the public and the administrative costs (which are unbillable) incurred by the Agency in processing FOIA requests. All persons responding to a request must provide their final search and review time to the Action Office in order to calculate billable fees. If the processing fees are billable (i.e., greater than \$14.00), FOIAonline generates the invoice.

Step 10 – Obtain Approval from an Authorized Official.

Full release responses and any other response to a FOIA request (including documents withheld in full) must be approved by the Associate General Counsel or Director of the Action Office or equivalent. Also, in cases where a program office is the Action Office and the FOIA at issue concerns information material to an active enforcement case, or other matter in administrative or judicial litigation, the material should be reviewed and approved by the appropriate OGC law office and the Division Director for the Action Office before the response is issued.

Step 11 – Respond to Request.

The Action Office uploads the response letter and all responsive records to FOIAonline and issues the final response letter to the requester through FOIAonline. The Action Office also closes all tasks in FOIAonline and issues the Final Disposition notice. The Final Disposition notice provides the requester with a link to the responsive documents in FOIAonline and includes an invoice to the requester (when applicable). If an email address is provided, the Action Office notifies the requester via email that the responsive records are available in FOIAonline; otherwise, the response package is provided via postal mail.

Step 12 – Finalize Actions.

The Action Office must ensure that all supporting documentation is entered in FOIAonline (e.g., records of conversations with the FOIA requester, notes to the record, and any other relevant information). The record copy of the FOIA response is maintained in FOIAonline according to applicable Agency record schedules if all responsive records are entered into FOIAonline. If any portion of the response is not entered into FOIAonline, the Action Office must maintain a copy of all responsive records according to applicable records schedules. The Action Office closes out the request in FOIAonline.

E. REFERENCES

- <http://www.epa.gov/FOIA/FOIAregs.htm>
- <http://www.justice.gov/oip/amended-FOIA-redlined.pdf>
- <http://intranet.epa.gov/oei/imitpolicy/qic/ciopolicy/2171-p-01.pdf>
- <http://www.justice.gov/oip/foia-guide.html>
- <http://www.justice.gov/oip/training-materials.html>
- <http://intranet.epa.gov/ohr/rmpolicy/ads/dm/1-30.htm> (Delegation Authority)

G. ATTACHMENTS

Attachment A: Template for responding to an improper FOIA request

Attachment B: Template to request a written assurance of payment


Attachment C: Template to clarify the scope of a FOIA request

Attachment D: Template to request an extension (10 days or less) based on “unusual circumstances.”

Attachment E: Template to request an extension (greater than 10 days) based on “unusual circumstances.”

Attachment F: FOIA Exemption Tip Sheet

Attachment G: Templates of final response letter

 3/31/15

Kraig Lattimore

Director of Resource Management Office and Senior Information Official
Office of General Counsel
U.S. Environmental Protection Agency

APPENDIX - DEFINITIONS

Action Office - The organizational unit that maintains the majority of records responsive to a FOIA request.

Agency FOIA Officer – The Agency FOIA Officer is the program manager for the National FOIA program. The Agency FOIA Officer coordinates and oversees the EPA FOIA administration responsibilities; issues expedited processing and fee waiver determinations; develops and reviews FOIA procedures, policies, and guidance; provides advice to Agency FOIA personnel in the program and regional offices; prepares annual reports to the Department of Justice (DOJ); and provides FOIA training to agency employees and other individuals covered under Section 3 of these procedures. The Agency FOIA Officer is located in the Office of Environmental Information at EPA headquarters.

Administrative Appeal – An independent review of the initial determination made in response to a FOIA request. Requesters who are dissatisfied with the response made on their initial request have a statutory right under 40 C.F.R. § 2.104(j) to appeal the initial determination within 20 days to an office in the Agency which will conduct an independent review. *(NOTE: OGC is responsible for managing all FOIA appeals at EPA with the exception of appeals that involve FOIA requests to the OIG or FOIA requests where OGC is the Action Office on the initial response. OIG handles its own appeals. The Office of the Administrator processes appeals where the OGC is the Action Office on the initial response.)*

Case – All records pertaining to a FOIA request.

Commercial Use – A type of request from or on behalf of a person who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests, which can include furthering those interests through litigation.

Confidential Business Information (CBI) – Trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.

Consultation – When an agency locates a record or a record that contains information provided by or of interest to another agency, it will ask for the views of that other agency on the disclosability of the records before any final determination is made. This process is called a “consultation.” (See also “referral.”)

Contributing Office – Organizational units that possess responsive records in addition to the Action Office.

Educational Institution – A preschool, public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education or an institution of vocational education, which operates a program or programs of scholarly research.

EPA FOIA Public Liaison – The EPA FOIA Public Liaison is the EPA contact point for the public if they have any issues with the handling of their FOIA request by the agency. The EPA FOIA Public Liaison can be reached at (202) 566-1659.

Existing records – Agency records that exist as of the date a FOIA request is received by EPA.

Expedited Processing – The processing of a FOIA request out of the order in which it was received and prioritized over other pending FOIA requests. The standards for expedited processing are set out in the FOIA and in the regulations of each federal agency.

Fee Categories – Categories under FOIA that determine assessments of fees to requesters. Requesters fall into one of five fee categories: (1) commercial requesters; (2) educational; (3) noncommercial scientific institutions; (4) representatives of the news media; and (5) all other requesters (i.e., requesters who do not fall into any of the other four categories).

Fee Waiver – A request made to an agency to waive any applicable fees for its processing of a FOIA request. Fee waivers are limited to situations in which a requester can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester. Requests for a fee waiver are evaluated on a case-by-case basis, and pursuant to the factors identified in 40 C.F.R. § 2.107(l).

FOIAonline – EPA’s FOIA tracking and management system. *See* www.foiaonline.regulations.gov.

FOIA Exemptions – Contained at 5 U.S.C. § 552(b) (1)-(9). *See* <http://intranet.epa.gov/foia/exemptions.html> or the box on page 2 of these procedures.

FOIA Time Limits – The time period in the FOIA statute for an agency to respond to a FOIA request (ordinarily twenty working days from the day a FOIA request is received and logged in by the appropriate FOIA Office).

Freedom of Information Act (FOIA) – The FOIA was signed into law in 1966. The law provides individuals with a statutory right of access to certain federal agency records. The FOIA requires agencies to disclose requested records unless they are protected from public disclosure by the FOIA. Congress included in the FOIA nine exemptions and three law enforcement exclusions to protect important interests such as national security, personal privacy, privileged communications, and law enforcement.

Full Denial – An agency decision not to release any records in response to a FOIA request because the records are exempt in their entirety under one or more of the FOIA exemptions, or because of a procedural reason, such as when no records could be located. A denial response must be signed by an Authorized Official.

Full Grant – An agency decision to disclose all portions of all records in full in response to a FOIA request.

Glomar Response – An agency's express refusal to confirm or deny the existence or nonexistence of records responsive to a FOIA request.

Initial Request – The request submitted by an individual to a federal agency for access to agency records on any topic. A FOIA request can generally be made by any person, to any federal agency, and only requires that requesters reasonably describe the records they are seeking and comply with agency regulations for making such requests.

Media Requester – Any person making a FOIA request who actively gathers news for an entity that is organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use.

Multi-Track Processing – A system that divides incoming FOIA requests according to their complexity so that simple requests requiring relatively minimal review are placed in one processing track (simple track) and more complex requests are placed in one or more other tracks (complex track). Requests granted expedited processing are placed in yet another track. Requests in each track are processed on a first in/first out basis.

Non-Commercial Scientific Institution – An institution that is not operated on a commercial basis but operated solely for conducting scientific research, the results of which are not intended to promote any particular product or industry.

No Records Response – A response to a FOIA request for which no responsive records were located.

Other Requester – Any person making a request that is not a member of the media, an educational institution, and is not making a request for a commercial interest.

Partial Grant/Partial Denial – An agency decision to disclose records or portions of records while withholding other records or portions of records that are exempt under the FOIA, or to otherwise deny a portion of the request for a procedural reason.

Records – Information in an agency's possession and control in any format including electronic format. DOJ notes that for FOIA purposes, "records" includes *all* tangible documentations of information regardless of whether they are records under 44 U.S.C. § 3301. (*NOTE: This is a broader definition than that used by the Federal Records Act and EPA records program and records schedules.*)

Redact – The act of removing exempt information from responsive documents either manually or utilizing redaction software.

Referral – When an agency locates a record that originated with, or is of otherwise primary interest to another agency, it will forward that record to the other agency to process the record and to provide the final determination directly to the requester. This process is called a “referral.” (See also “consultation.”)

Requester – Any individual (including non-U.S. citizens), corporation or association, public interest group, and state, local, tribal, or foreign government making a FOIA request. Requests from federal agencies, the Government Accountability Office, or Congress (e.g., the Speaker of the House, the President of the Senate, or the chair of a committee or subcommittee) are not processed under these procedures.

Responsive Record – A record falling within the scope of a FOIA request that an agency has located that may be provided or is under consideration for inclusion in a response to a FOIA request. A record may be “responsive” to a FOIA request, but may still be withheld as protected from disclosure by a FOIA exemption.

Unusual Circumstances – When there is: (1) a need to search and collect documents from organizations separate from the organization processing the request; (2) a need to search and collect a large volume of records; or (3) a need to consult with another agency (or a separate subdivision of the same agency) having a substantial subject-matter interest in the request.

Attachment A: Template for responding to an improper FOIA request

[Print Response on Agency Letterhead]

[DATE STAMP]

[Name]
[Company]
[Street]
[City, State Zip]

Re: Freedom of Information Act Request No. HQ-FOI-#####-##, Request to Clarify or Modify an Improper Request

Dear Mr./Ms. [Last name]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested [INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. For example, [EXPLAIN WHY YOU CANNOT IDENTIFY AND LOCATE THE RECORDS].

EPA's FOIA regulations state:

“Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want. The more specific you are about the records or type of records that you want, the more likely EPA will be able to identify and locate records responsive to your request.”
40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter. Additionally, the FOIA does not require federal agencies to respond to questions so please consider that as you are modifying your request.

Please contact me [OR A STAFF MEMBER] at [XXXXXXX] with your clarification or I can be reached at [XXXX] if you would like to set up a time to further discuss your request.

Sincerely,

[XXXXXX]
[TITLE]

cc: XXXXXX

Attachment B: Template to request a written assurance of payment

[Print Response on Agency Letterhead]
[DATE STAMP]

[Name]
[Company]
[Street]
[City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXX, Request for a
Written Assurance of Payment

Dear Mr./Ms. [Last name]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested [INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Option 1: On [DATE], the EPA's National Freedom of Information Office denied the fee waiver request that accompanied the FOIA request. Therefore, we are writing to provide you with an estimate for the cost of processing your latest request, and to seek assurance of payment before complying with the request.

Option 2: You were placed in the commercial fee category, which means you will be charged for search, review, and duplication costs in accordance with the Agency's regulations under 40 C.F.R. Part 2, Subpart A.

EPA has estimated that the aggregate cost to process your request as \$ XXX.00. This total is based on [X number] of staff members to search for, review, and duplicate responsive records, using the appropriate rates contained in 40 C.F.R. § 2.107(c)(2)(i)(B). Pursuant to 40 C.F.R. § 2.107(e), EPA requires written assurance of payment before processing the FOIA request when the estimated fees exceed \$25.00. Once your written assurance of payment is received, we will begin to process your FOIA request.

If the actual costs fall below the provided estimate, you will only be billed the actual cost amount. If we find that the provided estimate will be insufficient to cover actual costs, we will complete work up to the amount in the assurance of payment, provide you with an estimate of fees for the remainder of work, and seek assurance of payment before completing the remainder of work. If you would like to reduce the scope of your request to reduce fees, please contact me.

In estimating costs to process your FOIA requests, the EPA has interpreted your request for [EXPLAIN THE SCOPE OF THE REQUEST IF BROAD/NARROW]. If you wish to clarify your request to cover a [BROADER SCOPE/NARROWER SCOPE], the estimated costs will be [HIGHER/LOWER][.][IF BROADER: “, and EPA would need to receive further assurance of payment and would likely need additional time to process this request.”]

Please respond to this letter with your payment assurance for the full amount, [\$XXX.00] within ten calendar days from the date of this letter.

You may email me at [EMAIL ADDRESS] with your response or contact me at [TELEPHONE] if you have any further questions. If we do not receive a response from you within this time period, we will consider your request to be voluntarily withdrawn. If you wish to request information connected to this request in the future, please reference the FOIA request number.

Sincerely,

[NAME]

[TITLE]

Cc: XXXX

Attachment C: Template to clarify the scope of a FOIA request

[Name]
[Company]
[Street]
[City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXXX, Request to Clarify or Modify Your FOIA Request

Dear Mr./Ms. [Last name]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested [INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

The Agency is diligently processing your FOIA request. However, we have questions with respect to the following item(s): [LIST OR DESCRIBE WHAT YOU DON'T UNDERSTAND ABOUT THE REQUEST.]

We would like to provide you the opportunity to clarify the records that you are seeking. This FOIA request is tolled until we receive your clarification or modification. Please respond to this request for clarification or modification within ten calendar days from the date of this letter. Once we receive your clarification or modification, we will continue processing your FOIA request. If we do not receive a response from you within this time period, we will consider your request to be voluntarily withdrawn.

Please contact me [OR A STAFF MEMBER] at [EMAIL with your clarification or I can be reached at [TELEPHONE] if you would like to set up a time to further discuss your request.

Sincerely,

[XXXXXX]
[TITLE]

cc: XXXXXX

Attachment D: Template to request an extension (10 days or less) based on “unusual circumstances.”

[Print Response on Agency Letterhead]

[DATE STAMP]

[Name]
[Company]
[Street]
[City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXX, Request to
Extend the Deadline of the FOIA Response

Dear Mr./Ms. [Last name]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested [INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

Given the scope of the request, EPA anticipates that [Explain the **unusual circumstance(s)** for requiring an extension, it must be one of these three reason(s):—“...the response will require significant amount of EPA’s resources and time to search for, and appropriately examine the voluminous amount of records to complete this request” and/or “...to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request” and/or “...the need to consultation with another agency having a substantial interest in the determination of the request.”]

Pursuant to 40 C.F.R. § 2.104(d), and extension of time required to respond to your request is necessary. The new due date is [NEW DATE], ten working days from [DATE OF ORIGINAL DEADLINE]. For an update on the status of your FOIA request, please call me at [TELEPHONE] or access FOIAonline.

If you would like to modify or narrow your request so that it may be processed sooner, please contact [POINT OF CONTACT], who can be reached at [insert contact info].

In addition, you may contact the EPA FOIA Public Liaison at 202-566-1659 to assist with this matter.

Sincerely,

[MANAGER]
[TITLE]

Attachment E: Template to request an extension (greater than 10 days) based on “unusual circumstances.”

[Print Response on Agency Letterhead]

[DATE STAMP]

[Name]
[Company]
[Street]
[City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXX, Request to
Extend the Deadline of the FOIA Response

Dear Mr./Ms. [Last name]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA or Agency) on [MONTH DAY, YEAR], in which you requested [INSERT directly what the FOIA request stated or accurately paraphrase description of requested records].

[IF APPLICABLE: On [MONTH DAY, YEAR], EPA contacted to inform you that pursuant to 40 C.F.R. § 2.104(d), a ten day extension was necessary.]

Given the scope of the request, EPA anticipates that [Explain the **unusual circumstance(s)** for requiring an extension, it must be one of these three reason(s):—“...the response will require significant amount of EPA’s resources and time to search for, and appropriately examine the voluminous amount of records to complete this request” and/or “...to search for and collect the requested records from multiple EPA offices that are separate from the office processing the request” and/or “...the need to consultation with another agency having a substantial interest in the determination of the request.”]

[Provide more individual context of why the response will take more time. For example, do the records span a number of decades? Are you dealing with paper files, which will require scanning to process? Etc.]

EPA has initiated the coordination of and search for responsive records in our files. Because of this broad scope, it is difficult to predict with certainty how many records may be involved. Nonetheless, at this time, EPA estimates the Agency will be able to complete this request by [DATE, MONTH, YEAR]. [Of course, we will be working diligently working on the request and providing the information on a rolling basis. If we can respond sooner, we will let you know.] The next production will be completed by [MONTH DAY, YEAR].

If you would like to modify or narrow your request so that it may be processed sooner, please contact [POINT OF CONTACT], who can be reached at [insert contact info].

In addition, you may contact the EPA FOIA Public Liaison at 202-566-1659 to assist with this matter.

Sincerely,

[MANAGER]
[TITLE]

Attachment F: FOIA Exemption Tip Sheet

Privileges/Common Exemptions

Exemption 5 (includes common law privileges - deliberative process, attorney-client, attorney work product)

Threshold/Trigger— All FOIA's under **Exemption 5**, must meet the inter- or intra-government communication threshold/trigger (this may include Agency consultants and contractors but not other 3rd parties).

Deliberative Process Privilege

- (1) *predecisional* – A document is predecisional if it was “prepared in order to assist an agency decisionmaker in arriving at his decision,” rather than to support a decision already made
- (2) *deliberative* – Material is deliberative if it “reflects the give-and-take of the consultative process”

Consider Items Such As:

- Does information reflect give-and take discussion, does it contain analysis, recommendations, advice, or opinions; can include drafts
- Who drafted information, what authority and level, did information flow from subordinate to superiors
- Policy purposes implicated

Common Examples (not exclusive)

- Drafts, staff analysis, recommendations, advice, or opinions, internal e-mail discussions of potential courses of action, internal discussions about how to respond to a public inquiry, comments on draft rule-making documents, e-mails or memos discussing Agency options.
- Privilege exists to:
 - (1) encourage open, frank discussions (i.e. focus on chilling internal deliberations),
 - (2) protect against premature disclosure of proposed policies before adoptions, and
 - (3) protect against public confusion that might result from disclosure.

If applicable, these may be foreseeable harms relevant to the Holder FOIA memo (3/19/09) for discretionary release determinations. [<http://www.justice.gov/ag/foia-memo-march2009.pdf>]

Attorney-Client Privilege

- (1) *legal advice sought/relates to legal advice*
- (2) *with an attorney*
- (3) *made in confidence*
- (4) *by the client*
- (5) *kept confidential (in some jurisdictions – may have to show disclosure restricted to those who need to know within the Agency/Executive branch)*

Attorney Work Product¹

- (1) *prepared or obtained by or at the direction of an attorney because of the prospect of litigation or litigation*
- (2) *extends to documents prepared by or for a representative of a party, including an agent*

¹ Ordinary course of business not covered

Exemption 6

- (1) *personnel and medical files and similar files – read broadly***
(2) *clearly unwarranted invasion of personal privacy*

- * balancing test to determine whether there is a clearly unwarranted invasion of personal privacy – weigh the public’s right to disclosure against the individual’s expectation of privacy (the privacy interest in nondisclosure)
- * public interest focuses on whether records shed light on EPA’s performance of its statutory duties (and not requestor’s interest or need)
- * examples of privacy interest include personal details such as: health/medical info, age, marital status, phone numbers, home address, social security number, personal e-mail address, performance appraisal, unsuccessful job applicants

²Exemption 7(A)

- (1) *compiled for law enforcement purposes, and***
(2) *could reasonably be expected to interfere with enforcement proceedings that are pending or reasonably anticipated.*

Interference with law enforcement proceedings includes (but not limited to) whether disclosure:

- would hinder the government’s ability to control or shape the investigation;
- would enable targets of the investigation to elude enforcement or to suppress or fabricate evidence; or
- would prematurely reveal the government’s evidence or strategy

Exemption 4

- (1) *trade secrets and***
(2) *commercial or financial information obtained from a person and is privileged or confidential.*

Full List of FOIA Exemptions

The Freedom of Information Act entitles the following exemptions on documents being requested by the public:

1. Those documents properly classified as secret in the interest of national defense or foreign policy;
2. Related solely to internal personnel rules and practices;
3. Specifically exempted by other statutes;
4. A trade secret or privileged or confidential commercial or financial information obtained from a person;
5. A privileged inter-agency or intra-agency memorandum or letter;
6. A personnel, medical, or similar file the release of which would constitute a clearly unwarranted invasion of personal privacy;
7. Compiled for law enforcement purposes, the release of which
 - a. could reasonably be expected to interfere with law enforcement proceedings,
 - b. would deprive a person of a right to a fair trial or an impartial adjudication,
 - c. could reasonably be expected to constitute an unwarranted invasion of personal privacy,
 - d. could reasonably be expected to disclose the identity of a confidential source,
 - e. would disclose techniques, procedures, or guidelines for investigations or prosecutions, or
 - f. could reasonably be expected to endanger an individual's life or physical safety;
8. Contained in or related to examination, operating, or condition reports about financial institutions that the SEC regulates or supervises; or
9. And those documents containing exempt information about gas or oil wells.

http://www.epa.gov/foia/foia_exemptions.htm

² This exemption does not apply once proceedings are over

Attachment G: Template of final response letter (with no Exemption 4 (CBI) withholding)

[Print Response on Agency Letterhead]

[DATE STAMP]

[Name]
Company
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXX, Final Response

Dear Mr./Ms. [Last name]:

This letter is in reference to your Freedom of Information Act (FOIA) request received by the U.S. Environmental Protection Agency (EPA or Agency) on [Month, Date, Year], in which you requested records relating to [cite directly what the FOIA request stated or accurately paraphrase description of requested records]. [Note any additional correspondence with the requester clarifying the request or narrowing the scope, and the dates and results of any interim responses or correspondence].

The Office of General Counsel has concluded its search for records responsive to your request and is providing [the requested records in full/a portion of the requested records]. Portions of the records you requested are being withheld pursuant to 5 U.S.C. § 552(b)(#), [shorthand description of applicable exemption, such as: 552(b)(5), the Deliberative Process Privilege / 552(b)(5), the Attorney Client Privilege / 552(b)(5), the Attorney Work Product Privilege / 552(b)(6) Personal Privacy]. The records are exempt from disclosure because they [briefly describe reason for withholding such as: are predecisional and deliberative and would harm agency decision making if released (DPP)/ are confidential communications between an agency attorney and client concerning legal advice (ACP)/ are documents prepared by, or at the direction of, an attorney in contemplation of litigation(AWP)/ contain personal information which would be an unwarranted invasion of personal privacy if released (PP)]. The attached index of withholdings provides further information concerning the withheld records [or if voluminous -- "The attached appendix contains a categorical description of withholdings and a volume estimate."]. The cost to process your request was \$[#]. Please see the attached invoice for billing and payment instructions.

This letter concludes our response to your request. You may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX:

(202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the tracking number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

If you have any questions concerning this response please contact [Staff contact] of my staff at [###-###-####].

Sincerely,

[Name]
Associate General Counsel (*if withholding*)
Office of [_____]
Office of General Counsel

cc: XXXX

[Enclosure(s)]

Attachment G: Template of final response letter (with Exemption 4 (CBI) withholding)

[Print Response on Agency Letterhead]

[DATE STAMP]

[Name]
Company
Street
City, State Zip]

Re: Freedom of Information Act Request No. EPA-XX-XXXX-XXXXXX, Final Response

Dear Mr./Ms. [Last name]:

This letter is in reference to your Freedom of Information Act (FOIA) request received by the U.S. Environmental Protection Agency (EPA or Agency) on [Month, Date, Year], in which you requested records relating to [cite directly what the FOIA request stated or accurately paraphrase description of requested records]. [Note any additional correspondence with the requester clarifying the request or narrowing the scope, and the dates and results of any interim responses or correspondence].

The Office of General Counsel has concluded its search for records responsive to your request and is providing [the requested records in full/a portion of the requested records]. Portions of the records you requested are being withheld pursuant to 5 U.S.C. § 552(b)(4) confidential business information, [ADD other (#) if other exemptions] [shorthand description of applicable exemption, such as: 552(b)(5), the Deliberative Process Privilege / 552(b)(5), the Attorney Client Privilege / 552(b)(5), the Attorney Work Product Privilege / 552(b)(6) Personal Privacy]. I have determined that the records (or a portion of the records) responsive to your request have been claimed confidential and may contain trade secrets or commercial or financial information which is exempt from disclosure under 5 U.S.C. § 552(b)(4). Pursuant to 40 C.F.R. § 2.204(d)(1), your request is being initially denied because further inquiry by EPA is required before a final determination can be made. We will consult with the third party(ies) in connection with their business confidentiality claim(s) covering these records and [the appropriate EPA legal office] will issue a final confidentiality determination.

[IF OTHER EXEMPTIONS ASSERTED: The records are exempt from disclosure under [STATE THE EXEMPTION(S)] because they [briefly describe reason for withholding such as: are predecisional and deliberative and would harm agency decision making if released (DPP)]

are confidential communications between an agency attorney and client concerning legal advice (ACP)/ are documents prepared by, or at the direction of, an attorney in contemplation of litigation(AWP)/ contain personal information which would be an unwarranted invasion of personal privacy if released (PP)]. The attached index of withholdings provides further information concerning the withheld records. The cost to process your request was \$[#]. Please see the attached invoice for billing and payment instructions.

As noted above, the information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this **[denial or partial denial]** response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, D.C. 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, N.W. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, D.C. 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA request number shown above. For quickest possible handling, the appeal letter and its envelope should be marked **“Freedom of Information Act Appeal.”**

If you have any questions concerning this response please contact [Staff contact] of my staff at [###-###-####].

Sincerely,

[Name]
Associate General Counsel (*if withholding*)
Office of [_____]
Office of General Counsel

cc: XXXX

[Enclosure(s)]